QUESTIONS PRESENTED

I. Whether this Court should overrule *Booth v. Maryland* and *South Carolina v. Gathers* to the extent that they prohibit a state from permitting consideration of evidence of victim impact in a capital sentencing proceeding?

II. Whether the death sentence in this case should be upheld even if *Booth* and *Gathers* are not overruled because any violation of the principles of *Booth* and *Gathers* was harmless beyond a reasonable doubt?

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES CITED

TABLE OF AUTHORITIES – Continued

Page

STATUTES

TABLE OF AUTHORITIES – Continued

No. 90-5721

In The

Supreme Court of the United States

October Term, 1990

PERVIS TYRONE PAYNE,

Petitioner,

vs.

STATE OF TENNESSEE,

Respondent.

On Writ Of Certiorari To The
Supreme Court Of Tennessee

BRIEF OF RESPONDENT

STATEMENT OF THE CASE

Petitioner, Pervis Tyrone Payne, was tried by a jury in the Criminal Court for Shelby County, Tennessee, on two counts of murder in the first degree of Charisse A. Christopher and Lacie Jo Christopher, respectively, and one count of assault with intent to commit first-degree murder on Nicholas A. Christopher. The trial commenced on February 9, 1988, and on February 16, 1988, the jury returned a verdict finding the defendant guilty on all counts. Following a sentencing hearing, the jury unanimously found beyond a reasonable doubt the following

statutory aggravating circumstances applicable to both murder victims, Charisse and Lacie Jo: (1) The defendant knowingly created a great risk of death to two or more persons other than the victim murdered during his act of murder, and (2) the murder was especially heinous, atrocious, or cruel in that it involved torture or depravity of mind. Tenn. Code Ann. § 39-2-203(i)(3) and (5). With regard to the murder of Lacie Jo, the jury additionally found that the murder was committed against a person less than 12 years of age, and the defendant was 18 years of age or older. Tenn. Code Ann. § 39-2-203(i)(1). The jury found no mitigating circumstances sufficient to outweigh the aggravating circumstances and imposed two death sentences. As required by statute, each juror attested to their verdict by signing their names to the verdict form. Tenn. Code Ann. § 39-2-203(f). The trial judge sentenced the petitioner to thirty years for the assault.

On April 16, 1990, upon automatic, direct review pursuant to Tenn. Code Ann. § 39-2-205(a), the Supreme Court of Tennessee affirmed petitioner's convictions and sentences. In upholding the petitioner's sentence of death, the Supreme Court of Tennessee was required to determine (1) whether the sentence was imposed in an arbitrary fashion, (2) whether the evidence supported the jury's findings of the aggravating circumstances and the absence of mitigating circumstances sufficient to outweigh the aggravating circumstances and (3) whether the sentence of death is excessive or disproportionate to the penalty in other cases, given the nature of the crime and the defendant. Tenn. Code Ann. § 39-2-205(c)(1), (2), (3) and (4). By order of February 15, 1991, this Court issued a

writ of certiorari and, on February 19, 1991, the Court issued an amended writ of certiorari.

A. Trial: Guilt Phase

On the afternoon of June 27, 1987, Nancy Wilson, the resident manager of the apartment building where Charisse Christopher lived and who resided in the apartment directly beneath the Christophers, heard 28-year-old Charisse screaming, "Get out, get out," as if she were telling the children to leave. The noise briefly subsided and then began again and was "terribly loud, horribly loud." The resident manager called the police, saying she heard a blood-curdling scream from the upstairs apartment where Charisse Christopher lived. (R., XI, 631-34). Laura Picard, visiting her sister who lived in the apartment building, was sunbathing by the pool when she heard a noise like a person moaning. She heard a door banging and saw the back door to the victims' apartment slam open and shut three or four times. A dark-colored hand, with a gold watch on the wrist, protruded out the back door and kept trying to slam the door. (R., XI, 606-09).

The first officer on the scene saw a man standing on the second floor landing of the apartment. He came through the front door of the building carrying an overnight bag and a pair of tennis shoes and he had "blood all over him. It looked like he was sweating blood," according to the officer. The officer thought he was responding to a domestic call. He inquired of the man, later identified as the petitioner, how he was doing because he suspected the man had been injured. The petitioner responded, "I'm

the complainant." When the officer asked what was going on upstairs, the petitioner struck the officer with the overnight bag and began to run. (R., XII, 671-72).

When officers opened Charisse Christopher's apartment, they found blood everywhere. Charisse Christopher was on the floor in the kitchen. Lacie Christopher, two and one-half years old, was lying on the floor on her stomach. (R., XII, 676-77, 739). A baseball cap, later identified as belonging to the petitioner, was snapped on her arm near her elbow. A bloody butcher knife lay at her feet. (R., XII, 699-701). Paramedics quickly determined that Charisse and Lacie were dead. (R., XII, 739-42). Nicholas Christopher, three and one-half years old, was lying on the floor and was still breathing despite multiple knife wounds all over his body. One deep laceration of his abdomen caused his intestines to protrude out of the wound and onto the floor. Nicholas' eyes were wide open and he was still breathing. When one of the officers touched the boy, Nicholas started to move his arms and legs. On the way to the hospital, Nicholas held a wet pack to his protruding intestines to keep them moist. (R., XII, 749, 774-83). The officers at the scene collected various items of evidence, including the butcher knife, which was determined to be the murder weapon. (R., XII, 744-45).

The petitioner was subsequently located in the attic of a nearby apartment. He had blood on his body and three or four scratches across his chest. He was sweating and had trouble catching his breath. As he came down from the attic, he said to the officers, "Man, I ain't killed no woman." His pupils were contracted and he was foaming at the mouth. A packet was removed from his pockets which later tested to be cocaine. The police also

found a syringe wrapper and an orange cap from a hypodermic syringe. (R., VIII, 884-89). The overnight bag that the petitioner used to strike the officer was found in a dumpster in the area and it contained a bloody white shirt, among other items of clothing. (R., XIII, 940-42). When walking to the patrol car, the petitioner repeatedly stated, "It happened too fast." (R., XIII, 904-05). At the police station, officers removed a gold watch from the petitioner's person. (R., XIII, 906-07).

Charisse Christopher sustained forty-two knife wounds to her chest and abdomen and forty-two defensive wounds on her arms and hands, representing forty-one separate thrusts or stabbings. None of the wounds penetrated a large vessel and the cause of death was bleeding from all the wounds. Thirteen of the wounds were very serious and could have caused death by themselves. (R., XI, 481-86, 493-94). Charisse Christopher was menstruating and a used tampon was found by her body. (R., XI, 489-90; XII, 680). A specimen from her vagina tested positive for acid phosphatase, a result consistent with the presence of semen, but not conclusive absent sperm. No sperm was found. (R., XI, 489-90).

Lacie Christopher's death was also caused by multiple stab wounds to the chest, abdomen, back and head. There were a total of nine stab wounds. One of the wounds cut the aorta and would have been fatal. (R., XI, 490-92). Nicholas' wounds required seven hours of surgery during which he required seven units of blood, representing complete replacement of his blood. (R., XIII, 827-28). The most severe wound to Nicholas was in his

abdominal area where the knife had pierced him from the front to the back. The stabbing had lacerated his stomach, pierced holes in his abdominal muscle, small and large intestines, and colon and had entered his spleen, liver, and venae cava. Nicholas also sustained knife wounds to his neck, legs, hands, arms, and chest. (R., XIII, 816-18, 822-27).

Evidence introduced at trial established that blood of the same type as that of Charisse and Lacie was found on the petitioner's shirt, tennis shoes and overnight bag. (R., XIV, 1083-85). Blood of the same type as Nicholas was found on the pants the petitioner was wearing when arrested. (R., XIV, 1081-82). Human blood stains were found on the petitioner's wristwatch but there was not enough to conduct a blood-typing test. (R., XIV, 1082-83). Three beer cans, two unopened, were found in the victim's apartment. Tests established that the petitioner's fingerprints were on them. The petitioner's fingerprints were also found on the telephone and counter in the kitchen. (R., XIV, 1066-68).

In his defense, the petitioner claimed that he did not harm Charisse, Lacie or Nicholas. He maintained that he saw a black man come down the inside stairs and run by him. He said he heard a baby crying for help when he reached the landing and saw that the door was ajar. He maintained that he entered the apartment and pulled the knife out of Charisse's neck. He testified that the boy was on his knees crying and that he told Nicholas not to cry, that he was going to get help. He maintained that he got the blood on his clothing and body when he pulled the knife out of Charisse's neck. He said, "She reached up

and grab me and hold me, like she was wanting me to help her. . . . " He went to get some water when he thought he was going to vomit and then left to "bang" on some doors to get help but when he saw the police officer he panicked. According to petitioner's story, Charisse was still alive and able to speak when he left the apartment. (R., XV, 1215-34). On cross-examination, when asked to explain how he got blood stains on his left leg, he said it probably occurred when Charisse hit the wall and "splashed," although he then denied so testifying. (R., XVI, 1278-80). There was blood smeared on one of the walls and on the back door from the floor up to a height of approximately six or seven feet. (R., XIII, 927-42).

The petitioner presented five character witnesses who testified regarding his good reputation for truth and veracity. (R., XVI, 1320-31).

B. Trial: Sentencing Phase

At the sentencing phase, the state specifically incorporated by reference all of the evidence introduced during the guilt phase. The state also presented two witnesses: Mary Zvolanek, who was Charisse's mother, and a detective from the police department. Her testimony was as follows:

> Q: Ms. Zvolanek, how has the murder of Nicholas's mother and sister affected him?
>
> A: He cries for his mom. He doesn't seem to understand why she doesn't come home. And he cries for his sister Lacie. He comes to me many times during the week and asks me, Grandmama, do you miss my Lacie.

> And I tell him yes. He says, I'm worried about my Lacie.

(A. 2-3).

Nicholas, the child referred to in this testimony, is the same child who petitioner attacked along with Charisse and Lacie. Petitioner was found guilty of assault with intent to commit murder for his attack on Nicholas and was sentenced to thirty years' imprisonment.

Detective Wilson presented two minutes of a video tape that was made at the crime scene which depicted the bodies of Lacie and Charisse before they were removed. (XVIII, 1505-06).

The petitioner presented the testimony of his girlfriend, his mother, his father, and a doctor. His girlfriend, Bobbie Thomas, testified that she had a troubled marriage and that the defendant was a very caring person and that the time he had devoted to her children had helped them. She testified that the petitioner loved her children just as if he was their father and that her children still ask about the petitioner. (R., XVIII, 1508-11).

Petitioner's mother and father testified that petitioner had no prior criminal record, had no history of alcohol or drug abuse, worked in his father's business as a painter, was a good worker, was good to children, and was generally a good son. (R., XVIII, 1557-71).

Dr. Hutson, a clinical psychologist, testified that the petitioner tested one standard deviation below the norm of average intelligence. A test further indicated that he scored above normal in the area of schizophrenia; he

"was moving toward psychotic", but it was his opinion that the petitioner was neither psychotic, nor schizophrenic. (R., XVIII, 1515-30).

After the proof concluded at the sentencing hearing, the prosecutor argued, in part, during initial argument:

> But we know that Nicholas was alive. And Nicholas was in the same room. Nicholas was still conscious. His eyes were open. He responded to the paramedics. He was able to follow their directions. He was able to hold his intestines in as he was carried to the ambulance. So he knew what happened to his mother and his baby sister.
>
> Is that heinous? Is that atrocious? Is it cruel? Can you think of anything more torturous than that? Is there anything more outrageous than that? The imagination cannot even think of anything worse than that.

(A. 9).

He continued:

> There is nothing you can do to ease the pain of any of the families involved in this case. There is nothing you can do to ease the pain of Bernice or Carl Payne, and that's a tragedy. There is nothing you can do basically to ease the pain of Mr. and Mrs. Zvolanek, and that's a tragedy. They will have to live with it the rest of their lives. There obviously is nothing you can do for Charisse or Lacie Jo. But there is something you can do for Nicholas.
>
> Somewhere down the road Nicholas is going to grow up, hopefully. He's going to not want to know what happened. And he's going to know what happened to his baby sister and his mother. He is going to want to know what

type of justice was done. He is going to want to know what happened. With your verdict you will provide the answer.

(A. 12).

In her rebuttal argument, the prosecutor said:

. . . And there won't be anybody there – there won't be her mother there or Nicholas' mother there to kiss him at night. His mother will never kiss him goodnight or pat him as he goes off to bed, or hold him and sing him a lullaby. (A. 14).

* * *

Mr. Garts wants you to think about a good reputation, people who love the defendant and things about him. He doesn't want you to think about the people who loved Charisse Christopher, her mother and daddy who love her. The people who loved little Lacie Jo, the grandparents who are still here. The brother who mourns for her every single day and wants to know where his best little playmate is. He doesn't have anybody to watch cartoons with him, a little one. These are the things that go into why it is especially cruel, heinous, and atrocious, the burden that that child will carry forever. (A. 15-16).

* * *

Mr. Garts says but Pervis Payne has lived an exemplary life for twenty years. Well, what about Charisse, for twenty-eight years? What about Lacie Jo, for two years? They lived exemplary lives. But they are not here with us anymore. You have to weigh what has happened.

Ladies and gentlemen of the jury, this is the last thing I am going to say to you. But I want you to think about this when you go back into

your jury room. We have heard a lot about Charisse Christopher, Lacie Jo and Nicholas, and how they were as they appeared before Pervis Payne came into their lives. And this is what he did to them. Did they deserve it? Are you going to let it go unpunished?

(A. 17).

The Tennessee Supreme Court held that the testimony of Nicholas' grandmother did not create an unacceptable risk of the arbitrary imposition of the death penalty and was harmless beyond a reasonable doubt. It further found that the prosecutor's argument did not constitute error. (A. 40-43).

SUMMARY OF ARGUMENT

This case is an appropriate one for the Court to reconsider the overly inclusive and overly constrictive rules promulgated in *Booth v. Maryland* and *South Carolina v. Gathers*. In this case, the petitioner complains about introduction of proof under all three of the principal classifications of victim impact evidence: (1) harm to the victim and the victim's family, (2) characteristics of the victim, and (3) opinion of the victim's family as to sentence. Each type of victim impact evidence warrants an independent analysis.

The first type of victim impact evidence, that of harm to society and to the victim's family, is relevant to the sentencing decision in capital cases because it informs the jury of the defendant's personal responsibility. Two

underlying reasons support allowing a jury to consider the defendant's personal responsibility for the full extent of the harm his act caused. First, evidence of the effect of a murderer's act upon society is crucial to society's legitimate need to exact retribution and accord a full measure of punishment for all of the harm caused. Second, allowing consideration of the full range of harm caused by a defendant's intentional criminal conduct is necessary for the sentencer to make a fully informed and particularized moral decision in each case. Additionally, the holding in *Booth* that only those acts which are relevant to the defendant's mental state may be admitted during the sentencing phase results in an unworkable rule of law. *Booth* and *Gathers* thus present a major distortion in the Court's constitutional jurisprudence and should be overruled.

Notwithstanding the proposition that victim impact evidence should be admitted as relevant to the defendant's personal responsibility, such evidence should also be admissible where it establishes moral culpability. The Court's conclusion in *Booth* that such evidence never speaks to blameworthiness results from a needlessly restricted definition of the term. A defendant is morally culpable for all of the harm which should have been "reasonably anticipated". What may be "reasonably anticipated" depends upon (1) the defendant's awareness of particular circumstances of the crime or the victim's life or (2) that which falls within the range of possible consequences of crime drawn from human and societal experience. Harm which should have been reasonably anticipated constitutes a mental state that should be taken into account in capital cases. Evidence of such harm serves to inform the sentencer of the defendant's moral culpability and is in fact highly relevant to the moral

judgment which must be exercised by the jury in imposing sentence.

If this Court decides that evidence of harm should not be independently admitted on the basis of either personal responsibility or moral culpability, *Booth* should still be overruled because it fails to acknowledge that there are other ways that such evidence may be admitted. In this case, for example, much of the victim impact testimony was intertwined with proof of the crime itself. In many instances, such proof will be admitted during the guilt/innocence phase. It creates an anomaly to permit the evidence to be introduced during the guilt/innocence phase but to prevent references to it during the sentencing phase since the same jury must make their determination as to sentence based on the circumstances of the crime as well as the characteristics of the defendant.

The second type of victim evidence, that regarding the characteristics of the victim, also can be relevant to the decision of the jury in capital cases. The decisions in *Booth* and *Gathers* fail to acknowledge the many ways that such evidence may come to the attention of the jury. In many cases, such proof will be properly admitted as part of the circumstances of the crime or as part of the harm caused to society or the victim's family. It may also be admitted to establish a particular aggravating circumstance. Introduction of such evidence does not violate the Constitution. Moreover, proof about the victim's characteristics should also be admissible in order to remind the jury that the victim was a unique individual. Rather than barring evidence when it is offered to paint a "thumbnail sketch" of the victim, the Court should find that evidence about the victim's characteristics is admissible so long as

such evidence does not tend to suggest an impermissible basis for decision, such as race, and so long as the focus of the jury is not shifted to a weighing of the merits of the defendant's life against the life of the victim.

Similarly, *Booth* erroneously concludes that introduction of the third type of victim impact evidence, opinion of the victim's family as to the appropriate sentence, always constitutes a constitutional violation. It further fails to acknowledge that the expression of opinion by the victim's family can help to ameliorate feelings of helplessness and lack of control and channelize their desire for retribution. So long as the manner of expression does not lead a jury to believe that the decision is not theirs to make, no constitutional violation should occur.

The doctrine of *stare decisis* does not preclude overruling these cases. While *stare decisis* is the general rule in our system and serves important functions, this Court is generally more willing to overrule prior law when the erroneous holding involves a constitutional principle because legislative correction is impossible. Further, a restrictive constitutional decision often interferes, as it does here, with democratic self-governance, warranting flexibility in reconsidering prior decisions. Specifically, the rules promulgated in *Booth* and *Gathers* should be overruled because, among other things, (a) they produce confusion in application; (b) they rest on a mistaken practical assessment of the need for a prophylactic rule broader than any legitimate constitutional command; and (c) they rest on principles that cannot fairly be reconciled with the Constitution or other decisions of this Court. Finally, the Court's willingness to bow to the "force of better reasoning" is especially important in capital cases

which purport to reflect "an evolving standard of decency".

In any event, even if this Court determines that *Booth* should not be overruled, the death sentence in this case should be affirmed. As the Supreme Court of Tennessee found, the heinous nature of the crime petitioner committed was so great that the sentence of death was the "only rational punishment available." Thus, any error was harmless beyond a reasonable doubt.

ARGUMENT

I. THIS COURT SHOULD OVERRULE *BOOTH V. MARYLAND* AND *SOUTH CAROLINA V. GATHERS* TO THE EXTENT THAT THEY PROHIBIT A STATE FROM PERMITTING CONSIDERATION OF EVIDENCE OF VICTIM IMPACT IN CAPITAL SENTENCING PROCEEDINGS.

A. Introduction

This case represents the fourth time in four years that the admissibility of victim impact evidence has been addressed by this Court. Clearly, this Court and the states are at best uneasy with the overly inclusive rule promulgated in *Booth v. Maryland*, 482 U.S. 496 (1987). Perhaps part of the problem lies in the lack of recognition of the growing demand for victim impact evidence as a component of the "evolving standards of decency" of a maturing society. *Booth*, 482 U.S. at 520 (Scalia, J., dissenting). In *Booth* and *South Carolina v. Gathers*, 490 U.S. 805 (1989), the Court strayed from the fundamental principles which traditionally have provided enlightenment on

these evolving standards. *See Furman v. Georgia*, 408 U.S. 238, 442-43 (1972) (Powell, J., dissenting). As observed by the Court in *Woodson v. North Carolina*, 428 U.S. 280 (1976) "[t]he two crucial indicators of evolving standards of decency respecting imposition of punishment in our society . . . " are jury determinations and legislative enactments. *Id.* at 293. *Booth*'s treatment of the actions of thirty-six legislatures[1] in permitting victim impact evidence in criminal trials suggests that the Court gave no deference to the latter source, but instead substituted their subjective values. 482 U.S. at 509 n. 12. This Court has repeatedly cautioned against this temptation. *Furman v. Georgia*, 408 U.S. at 466-67 (Rehnquist, J., dissenting); *Gregg v. Georgia*, 428 U.S. 153, 173 (1976).

Also implicit in the *Booth* and *Gathers* decisions is the Court's abandonment of its reluctance to "dictate to the state[s] particular substantive factors that should be relevant to the capital sentencing decision." *California v. Ramos*, 463 U.S. 992, 999-1000 (1983); *Gore v. United States*, 357 U.S. 386, 393 (1958). The Court has departed from these and other well-established principles of Eighth Amendment jurisprudence due to a mistaken practical assessment regarding the manner in which admission of this class of evidence in capital sentencing should be controlled. Guided by that mistaken assessment, it has

[1] Through 1988, forty-four states had adopted statutes providing for victim impact information in the sentencing process. Appendix to Brief of Amici Curiae Washington Legal Foundation, The Reverend Dorothy Haynes, The Sunny Von-Bulow National Victim Advocacy Center, The Stephanie Roper Committee, Inc., The Crime Victims Legal Clinic, Parents of Murdered Children, The Unity Group, Inc., and the Allied Educational Foundation, *South Carolina v. Gathers*, 490 U.S. 805 (1989).

adopted a broad prophylactic rule which, though spawned by a legitimate concern for unfair prejudice suggested by certain aspects of this type of evidence, *Booth*, 482 U.S. at 505-08, is unsupported by any legitimate constitutional demand.

This case is an appropriate one for the Court to reconsider the overly broad and overly constrictive rules promulgated in *Booth*.[2] It contains the three principal classifications of victim impact evidence recognized in *Booth*: (1) harm to the victim and the victim's family; (2)

[2] Although the Supreme Court of Tennessee found any error to be harmless beyond a reasonable doubt, that finding does not constitute an adequate and independent state ground for the decision. First, the Court's reliance on *State v. Alley*, 776 S.W.2d 506 (Tenn. 1989), as precedent does not require the conclusion that the Court was applying a state harmless error analysis rather than one appropriate for federal constitutional errors. Indeed, the use of the standard, "harmless beyond a reasonable doubt," in this case and in *Alley* implies a federal constitutional analysis, and not the application of Tennessee's harmless error provision. *See Chapman v. California*, 386 U.S. 18, 24 (1967). *Cf.* Rule 36(b), Tenn. R. App. P. (error is harmless unless, "considering the whole record, error involving a substantial right more probably than not affected the judgment or would result in prejudice to the judicial process"). In any event, the citation to *Alley*, standing alone, falls far short of the "plain statement" required by this Court in *Michigan v. Long*, 463 U.S. 1032 (1983). In the absence of such a plain statement, this Court has held that it will accept "as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so." *Id.* at 1041. Furthermore, even if the Supreme Court of Tennessee did rely on state law, it is clear that it did so not on an independent basis, but because it felt compelled to do so by this Court's ruling in *Booth*.

characteristics of the victim; and (3) opinion of the victim's family as to sentence. *Booth*, 482 U.S. at 502. Further, in this case, the circumstances of presentation suggest a use of this evidence far below the level of concern expressed by the majority in *Booth*. Petitioner's complaint about the brief testimony of Mrs. Zvolanek relating Nicholas's psychological problems in coming to grips with the deaths of his mother and little sister press the outer limits of credibility. Indeed, given the petitioner's intent to have snuffed out the life of this four-year-old, a result for which he clearly could have been held fully responsible, it strains credulity for petitioner to complain about the fortuitous circumstance that Nicholas survived and was capable of experiencing psychological pain and suffering.

Each type of victim impact evidence warrants independent analysis. In undertaking this analysis, focus must remain on the phase of the sentencing process with which *Booth* and *Gathers* deal. This has been identified by the Court as the selection phase,[3] *Zant v. Stephens*, 462

---

[3] The respondent does not imply that a state's decision to use victim information as the basis for a statutory aggravating circumstance necessarily creates any constitutional infirmity. *Cf., Roberts v. Louisiana*, 428 U.S. 325, 332 (1976) (status of victim as peace officer as aggravating circumstance). In fact, many of the same arguments for allowing introduction of victim impact evidence at the "selection phase" of a capital sentencing proceeding also apply to the use of such evidence in the "narrowing phase" of the proceeding. The respondent merely wishes to point out that this case, like *Booth* and *Gathers*, involve the "selection phase," which means that the Eighth Amendment's crucial requirement of statutory guidance of sentencer discretion has already been satisfied prior to the introduction of the victim impact evidence.

U.S. 862, 879 (1983). As this Court has observed in *Zant*, once there is identified at least one statutory aggravating factor which qualifies the defendant as death eligible, the concerns of *Furman* that the penalty not be freakishly and wantonly imposed have been met. *Zant*, 462 U.S. at 876 n. 14; *Gregg v. Georgia*, 428 U.S. 153, 206-07 (1976). After the death eligible class has been identified, the Court has insisted upon a broad particularized inquiry at the selection phase to insure that a person is not arbitrarily put to death solely by the category of crime committed. *Skipper v. South Carolina*, 476 U.S. 1, 13 (1986) (Powell, J., concurring); *Woodson v. North Carolina*, 428 U.S. at 304.

B. Evidence of the full range of harm to society and to the victim's family is relevant to the capital sentencing decision.

1. Evidence of harm is relevant because it informs the jury about the level of defendant's personal responsibility.

At the most basic level, *Booth* and *Gathers* are deeply wrong in ruling that the Constitution forbids a state to base a capital punishment decision on the full range of harm caused by the murderer. The entire focus of *Booth* is on the defendant's mental state (blameworthiness or moral culpability). *Booth*, 482 U.S. at 504.

However, a capital jury must decide whether the death penalty should be imposed based upon the defendant's "*personal responsibility* and moral guilt". *Enmund v. Florida*, 458 U.S. 782, 801 (1982) (emphasis added); *Booth*, 482 U.S. at 502. The extent of harm for which society deems an individual accountable bears upon the extent of one's personal responsibility. *Booth*, 482 U.S. at 518

(Scalia, J., dissenting). Indeed the range of harm for which one should be held accountable is essential to the proposition of personal responsibility. Since the full range of harm caused by a defendant is relevant to his personal responsibility, the introduction of such evidence, unless otherwise constitutionally barred, is appropriate. That punishment should depend solely on the state of a defendant's mind is a proposition which is not reflected in the "text of the Constitution, nor in the historic practices of our society, nor even in the opinions of this Court." *Booth*, 482 U.S. at 520 (Scalia, J., dissenting). Punishment must depend also upon a defendant's "personal responsibility". *Enmund v. Florida*, 458 U.S. 782 (1982); *Coker v. Georgia*, 433 U.S. 584 (1977). The present case illustrates the departure by the Court from the traditional criminal law principle that the extent of harm done is a relevant consideration in setting punishment.[4]

In this case, defendant acted identically as to two-and-one-half-year-old Lacie Jo and three-and-one-half-year-old Nicholas. He brutally stabbed both children repeatedly. There was no difference in his mental state toward each as he fully intended to kill them both. The

[4] While the Supreme Court of Tennessee deemed the testimony of Mrs. Zvolanek of the effect on Nicholas to be "technically irrelevant," (A. 40), a fair reading of the court's opinion leads to the inescapable conclusion that the court was simply saying that the testimony was "technically irrelevant" under the rule announced by this Court in *Booth* and not that such information was generally irrelevant to the jury's decision. This distinction becomes clear when the court writes, in discussing the prosecutor's argument related to the harm caused, that such was "relevant to this defendant's personal responsibility and moral guilt." (A. 42).

only difference lay in that fundamental margin of harm between life and death. The harm done to Nicholas was fortuitously less than to Lacie Jo. As to Nicholas, punishment could not exceed a term of imprisonment. However, as to Charisse and Lacie Jo, the petitioner faces death. The respective punishments were differentiated by the harm for which petitioner should be held individually accountable, *i.e.*, his "personal responsibility". This case presents in principle the hypothetical posed by Justice Scalia in his dissenting opinion in *Booth* to demonstrate that the extent of harm measures the level of responsibility:

> The Court's opinion does not explain why a defendant's *eligibility* for the death sentence can (*and always does*) turn upon considerations not relevant to his moral guilt. If a bank robber aims his gun at a guard, pulls the trigger, and kills his target, he may be put to death. If the gun unexpectedly misfires he may not. His moral guilt in both cases is identical, but his responsibility in the former is greater.

Booth, 482 U.S. at 519 (Scalia, J., dissenting) (emphasis in text).

This class of evidence does not *per se* violate any constitutional provision. Before evidence of victim harm becomes a subject of jury consideration, the class of persons eligible for the death penalty has already been narrowed to include the defendant. Thus, evidence of harm to society does not impact the class of persons who are "death eligible," but is evidence of the defendant's personal responsibility and moral culpability to aid the jury

in making its decision. As such it does not give rise to the arbitrariness and capriciousness constitutionally condemned by *Furman*. There is no constitutional bar to prevent the jury from considering factors beyond those which are set out in the statute as aggravating circumstances.

> Our cases indicate, then, that statutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition; they circumscribe the class of persons eligible for the death penalty. But the Constitution does not require the jury to ignore other possible aggravating factors in the process of selecting, from among that class, those defendants who will actually be sentenced to death. [footnote omitted].

Zant v. Stephens, 462 U.S. at 878.

There are at least two underlying reasons that support holding a defendant personally responsible for the full range of harm caused by his intentional criminal conduct. First, evidence of the effect of a murderer's act upon society is crucial to the legitimate need of society to further the ends of retribution and to ensure a full measure of punishment for all of the harm caused.

Punishment is designed, at least in part, to exact retribution for a crime. Retribution is an objective that is "not inconsistent with our respect for the dignity of men." *Gregg v. Georgia*, 428 U.S. at 183. Rather, the death penalty is "an expression of the community's belief that certain crimes are themselves so grievous an affront to humanity that the only adequate response may be the

penalty of death." *Id.* at 184. More recently, this Court has written that "retribution is an element of all punishments society imposes" and "clearly plays a more prominent role in a capital case". *Spaziano v. Florida*, 468 U.S. 447, 462 (1984). The measure of retribution not only depends on how depraved the defendant's intent was but also should include the suffering he has inflicted on the society that is punishing him. The greater the harm, the more worthy the individual is of blame and the greater the penalty society may demand. Accordingly, all of the harm caused by the defendant's actions is highly relevant to the moral judgment which must be exercised by the jury in deciding what sentence to impose.

In this case, the petitioner brutally butchered to death Charisse Christopher and Lacie Jo Christopher in the presence of three-and-one-half-year-old Nicholas. Surely the State of Tennessee is entitled to exact retribution for the full range of the petitioner's heinous acts, including the fact that Nicholas is now motherless and must suffer all the psychological harm which results from witnessing petitioner's brutal acts. As a result of this Court's erroneous conclusion in *Booth*, the unintended and unforeseen impact on society and the victim's family can *never* be relevant to establishing the defendant's punishment. Consequently, states are prevented from punishing a murderer to the full extent of his personal responsiblity.

The second reason for allowing consideration of the full range of harm caused by a defendant's intentional criminal conduct is that such consideration is necessary for the sentencer to make a particularized, fully informed

moral decision. The Court's exclusive focus on a defendant's state of mind unduly constricts the specific assessment of the defendant which is essential to capital sentencing. It is obvious that the full extent of harm brought about by the intentional acts of a particular defendant are unique to each case. Accordingly, to assume at the selection phase that the range of harm for which all murderers will be held accountable is the same precludes the fully informed moral decision which must be made on a particularized basis. This Court has held that, in all but the rarest cases, the defendant must be permitted to present whatever mitigating factors he wishes as they relate to his character or the circumstances of the offense. *Lockett v. Ohio*, 438 U.S. 586, 604 (1978).

Indeed, the Court has even held that he must be permitted to introduce in mitigation *any* evidence that might convince the jury that he deserves a sentence less than death. *Skipper v. South Carolina*, 476 U.S. at 4. Yet, the jury is called upon to make a grave moral decision as to life or death of this individual without regard to the principles of personal responsibility. Evidence about the full extent of harm caused and for which he should be held accountable is essential to a fully informed moral decision. Denying such evidence renders the jury unable to fully speak for the public and to serve as a "significant and reliable objective index of contemporary values" as required by *Gregg*. *Gregg*, 482 U.S. at 181. It precludes the jury from making a decision which is truly a "uniquely, individualized judgment regarding the punishment that a particular person deserves." *Zant v. Stephens*, 456 U.S. at 900. This bar against particularized "personal responsibility" arouses a sense of one-sided unfairness in the

State's inability to present proof parallel to that being presented to the defendant in mitigation. This sense was expressed by the Tennessee Supreme Court in this case:

> It is an affront to the civilized members of the human race to say that at sentencing in a capital case, a parade of witnesses may praise the background, character and good deeds of Defendant (as was done in this case), without limitation as to relevancy, but nothing may be said that bears upon . . . the harm imposed, upon the victims.

State v. Payne, 791 S.W.2d 10, 19 (Tenn. 1990) (A. 42).

In this case, the victim impact testimony which was admitted by the State was extremely limited. It came during the testimony of Mary Zvolanek, the mother of the adult victim and the grandmother of both the child who was murdered and the surviving child. Her testimony covers less than one and one-half pages of the transcript. The specific testimony is as follows:

> Q: Ms. Zvolanek, how has the murder of Nicholas's mother and sister affected him?
>
> A: He cries for his mom. He doesn't seem to understand why she doesn't come home. And he cries for his sister Lacie. He comes to me many times during the week and asks me, Grandmama, do you miss my Lacie. And I tell him yes. He says, "I'm worried about my Lacie."

(A. 2-3).

Considering the testimony presented by the petitioner, it is anomalous that this limited testimony as to the crime's harm to Nicholas's emotional well being could be constitutionally inadmissible. During the same sentencing hearing, the petitioner's girlfriend was allowed to give testimony which directly paralleled the testimony of Mrs. Zvolanek. In the following colloquy, she responded to a question from the defense attorney as to the effect of these charges on her children:

> Q: Was he [the petitioner] attentive, or how did he behave?
>
> A: Just like a father that loved his kids.
>
> Q: Has the whole thing shocked you?
>
> A: Yes it has, it has also shocked them [the children] and they still don't – they believe he's innocent and *they ask about him all the time.*

(R. XVIII, 1511) (emphasis supplied).

It strains credulity that Eighth Amendment jurisprudence requires that the jury be permitted to hear that the children of the petitioner's girlfriend "ask about him all the time," yet that same jury is prohibited by the Constitution from hearing that the child of the victim and a victim himself continues to ask about his slain mother and sister. It also strains credulity that the Constitution permits a defendant to introduce testimony that he loved children and got along wonderfully with them, but does not permit evidence regarding the effect on a child who is motherless as the result of his acts. To allow a defendant to place such information before the jury, but to bar the State from offering parallel evidence, denies the jury proof of equivalent moral legitimacy and prevents it from

making a fully individualized decision based upon the personal responsibility of the particular defendant.

In his dissenting opinion in *Furman v. Georgia,* Justice Blackmun expressed concern for not extending the sentencing considerations to include the full extent of harm occasioned by a particular defendant:

> It is not without interest, also, to note that, although the several concurring opinions acknowledge the heinous and atrocious character of the offenses committed by the petitioners, none of those opinions make reference to the misery the petitioners' crimes occasioned into the victims, to the families of the victims, and to the communities where the offenses took place . . . These cases are here because offenses to innocent victims were perpetrated. This fact, and the terror that occasioned it, and the fear that stalks the streets of many of our cities today perhaps deserve not to be entirely overlooked.

Furman, 408 U.S. at 413-14 (Blackmun, J., dissenting).

As pointed out in Justice White's dissent in *Booth,* it is difficult to reconcile why punishment can be enhanced based upon the harm caused in all criminal cases except capital cases. *Booth,* 482 U.S. at 516. Indeed, this Court has said that " . . . a capital sentencing proceeding involves the same fundamental issue involved in any other sentencing proceeding – a determination of the appropriate punishment to be imposed on an individual." *Spaziano v. Florida,* 468 U.S. at 459. The majority in *Booth* sought to justify its holding banning victim impact evidence in capital cases, but not in other criminal cases, by noting that "death is a punishment different from other sanctions." *Booth,* 482 U.S. at 509 n. 12, *quoting Woodson v.*

North Carolina, 428 U.S. 280, 303-304, 305 (1976). The Court's statement in *Woodson* that "death is different" was based on the "need for reliability in the determination that death is the appropriate punishment in a specific case." *Id.* at 305. The Court held that North Carolina's procedural framework in making the death penalty mandatory in certain cases was unconstitutional because it did not insure the heightened degree of reliability needed in capital cases. Thus, the proposition that "death is different" compels the need for greater *procedural* safeguards. However, if evidence of the full range of harm caused by a defendant is truly irrelevant because it does not inform the sentencer of the defendant's mental state, then it should be equally irrelevant in all criminal cases. While the severity of the penalty in capital cases requires greater procedural safeguards, the qualitative difference in penalty cannot justify any difference in the substantive determination of whether a particular class of evidence is relevant.

Finally, the holding in *Booth* that only those factors which are relevant to defendant's state of mind may be admitted at the sentencing phase results in an unworkable rule of law. If *Booth*'s holding is followed to its logical conclusion, conflicts are created both with earlier capital sentencing cases and criminal law in general. This Court has held that a jury instruction in the sentencing phase that a governor may commute a sentence of life without parole to life with the possibility of parole does not violate the Constitution, *California v. Ramos*, 463 U.S. at 1001-09, even though such information does not speak to the defendant's moral culpability. Further, the jury may consider whether a defendant is likely to commit

other crimes of violence in the future when deciding on which sentence to impose. *Jurek v. Texas*, 428 U.S. 262, 272 (1976). Clearly, future dangerousness does not inform the jury about the defendant's moral culpability for the crime for which he is being sentenced. Similarly, the Court has held that a defendant must be allowed to present any evidence that might serve as a basis for a sentence less than death, even if it does not relate to his culpability for the crime he committed. *Skipper v. South Carolina*, 476 U.S. at 4-5.

As petitioner points out, a precedent should be overruled when experience demonstrates that the holding has resulted in a "major distortion in the court's constitutional jurisprudence." Pet. Br., 49, *quoting Thornburgh v. American College of Obstetricians & Gynecologists*, 476 U.S. 747, 814 (1986) (O'Connor, J., dissenting). Clearly, the Court's decision in *Booth* that *only* evidence which relates to the defendant's moral culpability is relevant to the jury's sentencing decision is a major distortion of the Court's constitutional jurisprudence and results in an unworkable scheme because it tears at the very fabric of commonly accepted notions of criminal responsibility in punishment.

2. Evidence of harm to society is relevant because it informs the jury about the defendant's moral culpability.

The majority of this Court in *Booth* held that the impact of a murderer's act on family members and society as a whole was inadmissible because such factors

"may be wholly unrelated to the blameworthiness of a particular defendant." *Booth*, 482 U.S. at 504. As set out in section 1, *supra*, evidence relating to the full range of harm caused by a murderer should be admitted as relevant to a defendant's "personal responsibility". Notwithstanding this proposition, evidence of harm to society and to the victim's family should still be admitted where it establishes the defendant's moral culpability.

The Court's conclusion in *Booth* that such evidence is generally unrelated to the defendant's blameworthiness is erroneous and results from an unjustifiably restricted definition of that term. Whenever a defendant chooses to commit an intentionally criminal act, he should properly be viewed as morally culpable for any and all harm that could have been reasonably anticipated to occur as a result of that crime. A sentencer's conclusion that such additional harm could have been "reasonably anticipated" might be based on a defendant's awareness of particular circumstances of the crime or of the victim's life situation.[5] Or, alternatively but no less significantly,

---

[5] The extent of the harm caused to Nicholas was certainly within the reasonable anticipation of the petitioner. The petitioner's girlfriend lived in the apartment across the hall from the victim and her small children, and he was a frequent visitor at his girlfriend's apartment. The petitioner must have known prior to entering the apartment that two small children and their mother were present or, if not, he certainly became aware of these facts upon entering the apartment. Any reasonable person would have anticipated that he was causing harm to Nicholas as he struck his fatal blows to Nicholas' mother and sister. It could not have come as a surprise to anyone that these acts would cause Nicholas psychological, as well as physical, harm.

this conclusion might be based on an understanding of the full range of possible consequences of the crime drawn from human and societal experience. It is a fact of life that human beings live within a community of family and friends, and participate in a complex web of human relationships. Any murderer should anticipate that killing a person will sever the web of interpersonal relationships, and, therefore, will almost inevitably harm others besides the murder victim. This constitutes a culpable mental state that may be taken into account in capital cases whenever the defendant's intentional conduct causes its natural, although not inevitable, consequences. *Tison v. Arizona*, 481 U.S. 137, 157-58 (1987).[6]

Significantly, even the petitioner in this case admits that moral culpability, as this Court referred to the

---

[6] The state of mind described in the text is not the same as the "reckless indifference" standard adopted in *Tison*, although the analytical framework resembles that in *Tison*. The difference is that, in *Tison*, as in *Enmund*, the issue was the defendants' level of moral culpability for the primary harm caused by their crime, *i.e.*, the deaths of the murder victims. The *Tison* Court properly insisted on a relatively high level of moral culpability with respect to the victims' deaths as a prerequisite to finding, in the first instance, that the death penalty would be a proportional punishment for the defendants' crimes. Here, on the other hand, there is no doubt that the petitioner was morally culpable, at the highest possible level, for the intentional murders of Charisse and Lacie Jo, and is thus properly death-eligible based on the *Tison* proportionality standard. The issue here, by contrast, is whether the petitioner's relatively lower level of moral culpability with respect to the additional harm caused to Nicholas can be used as simply one factor in the overall moral decision of whether to actually impose a death sentence.

concept in *Booth*, includes harm that a defendant neither intended to cause nor even knew would occur. The petitioner, in fact, appears to agree that all harm that could be reasonable anticipated to result from a defendant's intentional crime lies properly within the scope of the defendant's moral culpability. Pet. Br., 12-13 (referring to the "foreseeable" consequences of a crime as "relevant to show moral blameworthiness"). The petitioner simply argues that the state may not introduce the *actual* consequences of the crime (even if those consequences were, in fact, "foreseeble" to the defendant), but instead must limit its discussion of victim harm to speculation about what *might* have happened as a result of the defendant's crime. Neither the Eighth Amendment, nor any other constitutional provision, requires this Court to adopt such a convoluted and illogical rule.

As the petitioner in this case appears to suggest, a defendant's moral culpability is dependent upon the full range of what a defendant could or should have anticipated might occur, as of the time the crime was intentionally committed. Pet. Br., 13. It would be completely appropriate, therefore, within the context of moral culpability, for a state to punish a defendant for *all* reasonably anticipated harm, *whether or not* the harm actually occurred in the particular case. In our system of criminal justice, however, we do not always choose to punish to the full extent of moral culpability for those harms that were risked by a defendant's conduct but that did not occur. Rather, we sometimes allow defendants to benefit from the "fortuity" that not all of their anticipated harms actually occur. This does not negate the principles that such defendants are properly viewed as morally culpable

for all anticipated harms – instead, it stands as an example of our society's willingness to impose less punishment, in some cases, than a defendant's moral culpability would otherwise justify.

This Court should overrule *Booth* and acknowledge that a defendant may properly be viewed as morally culpable based on all additional harm that could have been reasonably anticipated by the defendant. In addition, the Court should further acknowledge that where the additional harm caused by a defendant's intentional choice to commit murder falls within the range of possible consequences inherent in human societal experience, then it can be fairly said that any reasonable person should have anticipated the additional harm. Certainly, evidence of such additional harm would serve to inform the sentencer about the defendant's moral culpability. In fact, such proof is highly relevant to the moral judgment which must be exercised by the jury in deciding what sentence to impose.

3. *Booth* and *Gathers* should be overruled because they fail to recognize the many ways that evidence of victim impact may be admitted in capital cases.

If this Court decides that evidence regarding harm to society and the victim's family is not relevant to personal responsibility and moral culpability, the Court's decision in *Booth* should still be overruled because it fails to acknowledge that there are many other ways in which such evidence may be admissible. This case presents a prime example of how victim impact testimony may be intertwined with testimony offered during the guilt

phase. The petitioner brutally murdered Charisse and her young daughter. He attempted to murder Nicholas Christopher. Miraculously, Nicholas survived the numerous stab wounds the petitioner inflicted upon him. There is no question but that Nicholas is a "direct" victim of the petitioner's violence. However, Nicholas is also a more "indirect" victim in that he continues to suffer today because he no longer has his mother or sister with him. Certainly, the jury was entitled to know, as it did, that Nicholas was present during the brutal slaying of his sister and his mother. Certainly the state was entitled in closing argument to remind the jury that and to argue that this circumstance of the crime was a factor in establishing that the petitioner's acts were heinous, atrocious, or cruel in that they involved depravity of mind. Yet, if those comments crossed the line into impermissible victim impact testimony, it is difficult to tell where that occurred.

A good example of victim impact testimony being mingled with the facts of the case is *People v. Clark*, 789 P.2d 127 (Cal. 1990). There, the murder was committed precisely because the defendant wanted the victim's wife to suffer because of her status and relationship to the defendant. The California Supreme Court found on the basis of *Booth* that this evidence should not have been admitted since it was impermissible victim impact testimony, although the court held that the error was harmless. *Id.* at 157-58. This Court has not said whether victim impact evidence that is properly admitted during the guilt phase may be relied upon in the sentencing phase of

a capital case or if it may be argued to the jury by the prosecutor.[7]

The blanket rule announced in *Booth* fails to acknowledge that often, as here, victim impact evidence will be introduced to the jury simply because it is intertwined with the facts establishing the circumstances of the crime. To allow victim impact evidence to be admitted during the guilt phase because it relates directly to the circumstances of the crime but to prevent references to it during the sentencing phase creates an anomaly. After all, the jury is charged with making a judgment regarding sentence based upon the nature and circumstances of the crime as well as the individual characteristics of the defendant. *Zant v. Stephens*, 462 U.S. at 879. In this case, the victim impact evidence about which the petitioner complains was entirely commingled with the proof of the crime and was therefore properly admitted.

Victim impact evidence may also be admissible, as the Court appeared to recognize in *Booth*, when admitted to "rebut an argument offered by the defendant," such as when the state wishes to establish the peaceable nature of the victim to rebut the defendant's claim that the victim was the aggressor. *Booth*, 482 U.S. at 507 n. 10, *citing* Fed. R. Evid. 404(a)(2).

---

[7] In *Gathers*, the religious material found among the victim's belongings was admitted into evidence during the guilt phase. The Court ruled that the prosecutor impermissibly argued about the content of the material to the jury during his closing argument in the sentencing phase. However, the text of the material was not discussed during the guilt phase and it is unclear whether the Court would have found that the argument passed constitutional muster if the text had been presented fully to the jury prior to the sentencing stage.

C. Evidence regarding the victim's character may be relevant and does not always violate the Constitution.

A primary reason for the majority's ruling in *Booth* was the legitimate concern that "mini-trials" on the victim's worth would be permitted in capital cases. The Court was understandably concerned that juries not make a decision as to whether to impose life or death based upon a weighing of the relative worth of the victim's life against that of the defendant's. The respondent agrees that such a result should be avoided. However, the majority in *Booth* failed to acknowledge that not all character evidence rises to the level of a constitutional violation.

It is often the case that proof of some characteristics of the victim will be a part of the evidence which properly comes in during the guilt/innocence phase. For example, in this case, the fact that Charisse was the mother of two children, that she occasionally suffered from sinus headaches, that she was single and that she was a socially participating neighbor in the apartment complex all properly came in during the guilt/innocence phase. Similarly, evidence regarding the character of the victim may be admitted in order to rebut an argument advanced by a defendant that the victim was the aggressor. *Booth, supra,* 482 U.S. at 507 n. 10, *citing* Fed. R. Evid. 404(a)(2).

Evidence of a victim's characteristics may also be properly admitted where it is presented to the jury as a

part of the evidence of harm caused by the murder to society or the victim's family. As set out in Section A, such evidence is constitutionally permissible. In some cases, there may be information about the victim's characteristics commingled with the evidence of harm. Indeed, as Justice Scalia has observed, it is often impossible to tell which is which. *Gathers,* 490 U.S. at 823 (Scalia, J., dissenting).

Similarly, evidence about the characteristics of the victim may be admitted to prove an aggravating circumstance. Some aggravating circumstances are based solely on the status of the victim, such as the victim's occupation as peace officer, fireman, judge or prosecutor. Tenn. Code Ann. §39-2-203(i)(9). In fact, in this case, the jury found that Lacie's age was an aggravating factor since she was under twelve and the petitioner was over eighteen. Tenn. Code Ann. §39-2-203(i)(1). Of course, proof of Lacie's age was needed to establish this aggravating circumstance, and even the petitioner does not complain that such evidence was inadmissible.

Moreover, proof about the victim's characteristics should be admissible even where it is not intertwined with other admissible evidence in order to remind the jury that the victim was also a unique individual. A "thumbnail sketch of the victim's difficult childhood" in order to give the jury a "quick glimpse of the life the petitioner chose to extinguish" does not violate the constitution. *Mills v. Maryland,* 486 U.S. 367, 397 (1988) (Rehnquist, J., dissenting). The defendant is not constitutionally entitled to have his gross violation of a unique human life sanitized in a capital sentencing proceeding. To remove the ability of the state to paint even a minimal

picture of the "uniqueness of the life" the defendant has chosen to extinguish is to do just that.

In painting the thumbnail sketch, the state would, of course, be precluded from relying on those characteristics of the victim which would tend to suggest a decision on a constitutionally impermissible basis. These would include, at least, race, sex and religious preference. *See generally McCleskey v. Kemp*, 481 U.S. 279, 309 n. 30 (1987). Aside from these characteristics which have inherent constitutional limitations, other character evidence may be presented without violating the Constitution so long as it is presented in a manner that does not tend to shift the focus of the jury to a weighing of the relative worth of the defendant's life against that of the victim. This standard would address the concerns of the majority without going to the extreme of a blanket prohibition against victim characteristic evidence.

In this case, the characteristics of Charisse as a good mother whom Nicholas misses and Lacie as a playmate who is also missed is so blended with proof of the crime itself and with evidence of the harm suffered by Nicholas that it simply does not offend the Constitution. Moreover, the generalized statement by the prosecutor about the exemplary life led by Charisse clearly did not bring about the shift in focus which the Constitution would prohibit. A rule which narrowly addresses the potential problem while still providing an opportunity for the state to "humanize" the victim best serves the jury in making its informed moral decision in a manner preferable to the *per se* bar in *Booth*.

D. There is no constitutional requirement that there be an absolute bar on admission of the opinions of victims' families as to sentence.

The third and final type of victim impact information held unconstitutional in *Booth* was the expression of an opinion by the victim's family that the defendant should receive the death penalty. The respondent acknowledges that such testimony must be handled with extreme care. However, the Court in *Booth* incorrectly concluded that such opinions would *always* be constitutionally impermissible. Permitting a "secondary victim" of a murder case, that is, an immediate family member, from expressing their opinion as to sentence can serve an important purpose. Allowing an immediate family member to express such an opinion can help to make that "secondary" victim whole. Victims of violent crimes often experience feelings of lack of control and helplessness. Peterson and Seligman, *Learned Helplessness and Victimization*, J. Soc. Issues (No. 2) 103 (1983). Allowing the family of the victim to express their opinion, if they so wish, is a means by which family members may be able to ameliorate their feelings of lack of control and helplessness. Such a procedure would help to channelize the victim's need for retribution. *See Furman v. Georgia*, 408 U.S. 238, 308 (1972) (Stewart, J., concurring); *Tison v. Arizona*, 481 U.S. 137, 181 (1987) (Brennan, J., dissenting). Indeed, this Court has said that capital punishment is, in part, "an expression of society's outrage at particularly offensive conduct" and is "essential in an ordered society that asks its citizens to rely on legal process rather than self-help to vindicate their wrongs." *Gregg v. Georgia*, 428 U.S. at 183. Permitting the immediate family of the murder victim to express

their opinion would serve to reinforce to citizens that their reliance on the legal process is well founded.

Moreover, so long as the narrowing of the class of death eligible persons is not based upon a statutory aggravating circumstance relating to the wishes of the victim's family, there should be no constitutional bar to the jury's consideration of such an opinion at this stage. The defendant is already in the class of persons who are "death eligible" and there is no reason that one consideration at this stage could not be the wishes of the victim's family.

The Court in *Booth* should have recognized that there is no *constitutional* problem with the admission of such evidence so long as the manner and quantity of the evidence which is admitted does not tend to diminish the jury's sense of responsibility for making the life and death decision. *Cf. Caldwell v. Mississippi*, 472 U.S. 320 (1985). Additionally, it is doubtful that a juror would be surprised to hear that the victim's family wants the most severe penalty possible imposed since that is likely to be the conclusion that most persons would draw, even absent any testimony. Thus, it is doubtful that the expression of such an opinion would result in a juror imposing the death penalty when he otherwise would have declined to impose it.

In this case, despite petitioner's insistence to the contrary, no testimony was adduced as to the wishes of the victim's family for a particular sentence. The prosecutor never argued to the jury that any family member wanted the death sentence, but only reminded them that family members would be cognizant of their decision and

would look to the jury's verdict for an indication of whether justice was done.

> Somewhere down the road Nicholas is going to grow up, hopefully. He's going to want to know what happened. And he is going to know what happened to his baby sister and his mother. He is going to want to know what type of justice was done. He is going to want to know what happened. With your verdict you will provide the answer.

(A. 12).

At no time did the prosecutor say that Nicholas or any other family member recommended that a sentence of death be imposed. Reminding the jury that family members would look to the verdict and reach their own conclusion as to whether justice was done was legitimate prosecutorial argument. This rhetorical flourish did not constitute proof, such as was admitted in *Booth*, that particular family members wanted the defendant put to death. However, as a result of the broad language used by the Court in *Booth*, the petitioner contends that this argument violated the proscription against admitting opinion testimony.

Certainly the manner and amount of comment regarding Nicholas' "opinion" did not tend to diminish the jury's sense of responsibility for making the decision.[8]

---

[8] Assuming that, as in this case, no *Caldwell*-type issue is presented, then the only remaining issue is whether the argument was so prejudicial that it violated due process by denying petitioner a fundamentally fair trial. *Donnelly v. DeChristoforo*, 416 U.S. 637 (1974); *Darden v. Wainwright*, 477 U.S. 168 (1986). The argument advanced by the prosecutor certainly did not rise to such a level. Indeed, it was extremely mild compared to

(Continued on following page)

Rather, if anything, it merely emphasized to the jury that the sentence to be imposed was, in fact, their decision and a grave one at that.

E. The doctrine of *stare decisis* does not preclude overruling *Booth* and *Gathers*.

Stare decisis is the general rule in our system and serves important functions of stability and predictability. This Court is generally more willing to overrule prior law when the prior erroneous holding involves a constitutional principle. Such flexibility is warranted because legislative correction is impossible. In *United States v. Scott*, 437 U.S. 82 (1978), the Court overruled an opinion it had issued just three years earlier, *United States v. Jenkins*, 420 U.S. 358 (1975), because the Court was convinced that the prior holding was erroneous. Quoting Justice Brandeis, the Court said:

> [I]n cases involving the Federal Constitution, where correction through legislative act is practically impossible, this Court has often overruled its earlier decisions, *Brunett v. Coronado Oil & Gas Co.*, 285 U.S. 393, 406-408, 52 S.Ct. 443, 448, 76 L.Ed. 815 (1932) (dissenting opinion).

(Continued from previous page)

the statements made by the prosecutor in *Darden*. *id*. at 179-83. In light of the mild nature of the remarks and the overwhelming evidence both of petitioner's guilt and suitability for the death penalty given the heinous nature of this crime, the argument is clearly not a sufficient basis for setting aside petitioner's death penalty under *Darden* or *Donnelly*.

United States v. Scott, 437 U.S. at 101. In addition, flexibility is warranted where, as here, a restrictive constitutional decision interferes with democratic self-governance. Justice Powell warned of the threat to the democratic processes in his dissent in *Furman*:

> Nothing short of an amendment to the United States Constitution can reverse the Court's judgments. Meanwhile, all flexibility is foreclosed. The normal democratic process, as well as the opportunities for the several States to respond to the will of their people . . . is now shut off . . .
>
> The sobering disadvantage of constitutional adjudication of this magnitude is the universality and permanence of the judgment. The enduring merit of legislative action is its responsiveness to the democratic process . . .

Furman, 408 U.S. at 462 (Powell, J., dissenting).

Specifically, the rules promulgated in *Booth* and *Gathers* should be overruled because, among other things, (a) they produce confusion in application; (b) they rest on a mistaken practical assessment of the need for a prophylactic rule broader than any legitimate constitutional command; and (c) they rest on principles that cannot fairly be reconciled with the Constitution or other decisions of this Court.

The lessons of experience suggest that these decisions are creating substantial confusion in application. *Gathers*, 490 U.S. at 805 (O'Connor, J., dissenting). As this case demonstrates, even knowing what is potentially constitutionally impermissible can be difficult where the allegedly unconstitutional testimony and argument is

commingled with the proof and circumstances of the crime.[9]

Additionally, courts are having great difficulty in knowing when the testimony may be otherwise admissible. *See, e.g., State v. Huertas,* 553 N.E.2d 1058 (Ohio 1990), *cert. granted,* ___ U.S. ___, 111 S.Ct. 39, *dismissed as improvidently granted,* ___ 111 S. Ct. 805 (1991) (death sentence reversed, holding that the defendant's actual knowledge of the victim's family was irrelevant and portions of the victim impact evidence inadmissible even though some of it came as a direct response to evidence offered in mitigation by the defendant); *People v. Clark, supra.* Moreover, many courts are relying on a harmless error analysis as an alternative basis for those decisions upholding the death sentence, perhaps signifying their confusion and uncertainty. *E.g., State v. Boyd,* 797 S.W.2d 589, 598 (Tenn. 1990) (comments did not focus on victim's characteristics and, if error, it was harmless in view of the

---

[9] In addition to the testimony and argument over which the petitioner is aggrieved, there was testimony in the guilt phase by Joseph Zvolanek that when he last saw his grandchildren alive, they were playing on some swings and that his daughter suffered from chronic sinus headaches. (R., XI, 475-76). There was also proof that Nicholas was conscious when found, that he held a wet pack to his protruding intestines on the way to the hospital, (R., XVII, 744-83), and the prosecutor commented on this during closing argument in the sentencing phase. (A. 9). It is unclear whether this constitutes impermissible evidence, but if it does then the fact that defense counsel has never contended that this testimony and argument violates *Booth* and *Gathers* emphasizes the confusion present as a result of these cases.

overwhelming evidence of defendant's guilt); *People v. Kelly,* 800 P.2d 516, 538 (Cal. 1990) (while arguably inappropriate, remarks brief and mild and therefore harmless); *Byrne v. Butler,* 845 F.2d 501, 511 (5th Cir. 1988) (unlike *Booth,* comments of prosecutor were brief and cryptic and did not rise to the level of constitutional error).

The constitutional rule promulgated in *Booth* and *Gathers* rests on a mistaken practical assessment of the need for a prophylactic rule broader than any legitimate constitutional command. This Court expressed understandable concerns in *Booth* over the potential for abuse in the introduction of *some* types of victim impact evidence. However, no such abuse has occurred in this case. Moreover, the concerns expressed by the majority could be adequately addressed by the trial judge's weighing of the relevancy of the proffered evidence against the level of unfair prejudice it might cause, just as trial courts do regularly in all criminal cases, including capital cases or other limiting rules as suggested herein. In fact, the majority in *Booth* acknowledged the trial judge's authority and ability to make such decisions:

> The trial judge, of course, continues to have the primary responsibility for deciding when this information is sufficiently relevant to some when legitimate consideration to be admissible, and when its probative value outweighs any prejudicial effect. c.f. Fed. Evid. 403.

Booth, 480 U.S. at 507 n.10. This approach to handling the concern that *some* victim impact testimony may be unfairly prejudicial is greatly preferable to the broad prophylactic rule adopted in *Booth* which removes an

entire class of relevant evidence from the jury's consideration. Adopting a more traditional approach to the admission of victim evidence is also more consistent with the Court's historic deference to state legislatures and courts on issues of substantive evidence. The decisions in *Booth* and *Gathers* depart from this Court's general commitment to leaving basic *substantive* policy choices regarding what factors warrant particular punishment to legislative choice. *Gore v. United States*, 357 U.S. 386, 393 (1958); *California v. Ramos*, 463 U.S. at 999. Such policy choices are at the heart of democracy. By preempting the substantive determination of whether this class of evidence should be barred in capital cases, *Booth* and *Gathers* "disserve[ ] principles of democratic self-governance." *See Garcia v. Metro. Transit Authority*, 469 U.S. 528, 547 (1987).

That *Booth* and *Gathers* rest on principles that cannot be fairly reconciled with other decisions of this Court is discussed *supra* in Argument I, Section B1.

In addition to the foregoing factors, as Justice Scalia has pointed out, the Court's willingness to bow to "the force of better reasoning", even when the erroneous holding is a recent precedent, is particularly important in capital cases which purport to reflect "an evolving standard of decency". *Gathers*, 49 U.S. at 824 (Scalia, J., dissenting); *Cf. Furman v. Georgia*, 408 U.S. at 330 (Marshall, J., concurring). Eighth Amendment law, as it has developed, looks primarily to the general practices and laws of states as an objective means of determining what is a "cruel and unusual" punishment. *Id.* If states abandon a practice to conform to an erroneous decision, that method would become unavailable, even though the reason for

the newfound abandonment might not be a general societal moral condemnation of the practice. The Court would then have to resort to less objective and hard to discern criteria to answer the Eighth Amendment question of whether the practice is in fact consistent with prevailing standards of decency. The Court could avoid putting itself in that difficult position by overruling the erroneous, confusion-producing, recent Eighth Amendment precedent of *Booth* and *Gathers*.

II. THE DEATH SENTENCE IN THIS CASE SHOULD BE UPHELD EVEN IF *BOOTH* AND *GATHERS* ARE NOT OVERRULED BECAUSE ANY VIOLATION OF THE PRINCIPLES OF *BOOTH* AND *GATHERS* IS HARMLESS BEYOND A REASONABLE DOUBT.

The Supreme Court of Tennessee found that the victim impact testimony of Mrs. Zvolanek and the prosecutor's arguments were relevant to establish the petitioner's personal responsibility and moral guilt. However, it found that assuming the evidence and argument violated the Eighth Amendment, it was harmless beyond a reasonable doubt, noting that:

> [t]he "personal responsibility", the "moral guilt" and the "blame worthiness" of the person who committed these crimes, was established by the proof at the guilt phase, to-wit, that inhuman brutality, without reason or explanation was heaped upon three innocent human beings. Once that person's identity was established by the jury's verdict, the death penalty was the only rational punishment available.

State v. Payne, 791 S.W.2d at 19 (A. 43).

The record in this case fully supports the Tennessee Supreme Court's finding in this regard. Charisse Christopher sustained multiple wounds, representing at least forty-one knife thrusts. (R., XI, 481-86). Lacie Christopher suffered a total of nine wounds. Nicholas also suffered multiple stab wounds. (R., XI, 490-92; XIII, 811-16). The jury need only have considered the number of times the petitioner raised that butcher knife and brought it down into the bodies of his victims to comprehend the cruelty and the depravity of the crime committed. The petitioner's cruel and depraved acts established without question, as the Supreme Court of Tennessee found, that the death penalty is the only rational sentence that could have been given.

Finally, it is doubtful that it came as any surprise to a jury of twelve reasonable men and women that a small child would express concern about his mother and only sibling whom he saw brutally butchered to death before his eyes. This, along with the overwhelming proof, apart from any proof concerning the impact on Nicholas, of the petitioner's guilt and his suitability for the death penalty, renders any error in the admission of this proof and argument harmless beyond a reasonable doubt. *Satterwhite v. Texas*, 486 U.S. 249 (1988).

CONCLUSION

The judgment of the Supreme Court of Tennessee should be affirmed.

Respectfully submitted,

CHARLES W. BURSON
Attorney General & Reporter
State of Tennessee

KATHY M. PRINCIPE
Assistant Attorney General

450 James Robertson Parkway
Nashville, Tennessee 37243-0485
(615) 741-3487

Counsel for Respondent